Supreme Court, U.S.
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No. 02-1710

IN THE

Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

MARK G. WEINBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Even respondent does not deny that before Chicago enacted the ordinance invalidated in this case, there was a serious congestion problem caused by peddlers outside the United Center, where tens of thousands of people routinely gather for major events, but thereafter, that problem disappeared. As our *amici* explain, the problem of crowd control outside major sports venues exists nationwide; for that reason, peddling bans are both necessary and ubiquitous. See Brief Amicus Curiae of Major League Baseball, the National Hockey League, the National Basketball Association, the National Football League, the United Center, and U.S. Cellular Field in Support of Petitioner 1-2 ("MLB Br."). The decision below, however, makes virtually every peddling ban across the country vulnerable to challenge. That, in conjunction with the conflict between the decision below and holdings in the Ninth and District of Columbia Circuits, amply justifies plenary review, if not summary reversal.

1. Peddling caused serious problems before the ordinance at issue here was enacted, but not after. Pet. App. 45a-46a. Under these circumstances, it is difficult to grasp any basis for the Seventh Circuit's holding that the ordinance failed to advance a legitimate governmental interest. The Seventh Circuit's view that the ordinance is invalid because Chicago could have granted respondent—and perhaps other booksellers—an exemption from regulation without adding much to congestion is simply an insistence that municipalities find the least restrictive alternative whenever they regulate expressive activity. This Court—and the other circuits to consider restrictions on peddling in public—have decisively rejected that demanding test for municipal regulation.

a. The Seventh Circuit plainly erred when it held that the ordinance advanced no legitimate governmental interest because there was no showing that either respondent himself or booksellers in general had produced congestion outside the

United Center. See Pet. 8-10. Respondent nevertheless defends the decision below, observing that "[t]here was no evidence that anyone other than Mr. Weinberg had attempted to sell books outside the United Center," and "no persuasive evidence that Mark Weinberg had interfered with pedestrian traffic while selling his book." Resp. Br. 9. But the reason that respondent created no significant congestion was that everyone else was obeying the no-peddling law. The first illegal peddler will rarely pose significant problems, but that does not mean that he is entitled to any special immunity from regulation.

This point was settled by *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Upholding a rule prohibiting solicitation outside of official booths at a state fair, this Court explained that "the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced . . . ." *Id.* at 654. And while respondent denies that "peddlers of other types of merchandise are . . . similarly situated to Mr. Weinberg" (Resp. Br. 9), that claim is also at odds with *Heffron*. ISKCON distributed and sold religious literature (see 452 U.S. at 645), and yet this Court ruled that ISKCON must be treated as similarly situated to "other social, political, or charitable organizations," and even "commercial organizations." *Id.* at 653.

Heffron decisively rejects the view that booksellers have any special immunity from peddling restrictions in areas of special congestion.[1] Even apart from *Heffron*, the decision

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[1] Respondent attempts to distinguish *Heffron* on the basis that the state fair was a "limited public forum." Resp. Br. 15. Restrictions on speech in a limited or designated public forum and a traditional public forum, however, are evaluated under the same standards. See *Perry Local Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983). Respondent is correct that in *Heffron* this Court observed that the

below cannot be squared with the long-standing rule that booksellers have no special immunity under the First Amendment from generally applicable regulations. See Pet. 9-10. Thus, if respondent may defy a no-peddling ordinance—at least absent proof that he has personally been disruptive—then so can those who sell audio books on tape, videos containing filmed versions of books, or, more generally, those who sell artwork, T-shirts bearing messages, or indeed any other commodity that is protected by the First Amendment. But when enough peddlers appear outside a stadium—even if each of them behaves as best he can—a serious congestion problem will result. The Seventh Circuit's holding provides municipalities with no principled way to determine which peddlers can then be removed consistent with the First Amendment. The only workable approach is to enforce peddling bans evenhandedly, as this Court commanded in *Heffron*. Moreover, requiring peddling bans to be limited to particular individuals who have previously disrupted traffic flow conflicts with the equally settled principle that even when regulating expressive conduct in a traditional public forum, a narrowly tailored regulation "need not be the least restrictive or least intrusive means." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Accord, *e.g.*, *Hill v. Colorado*, 530 U.S. 703, 726 (2000); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984).

b. Respondent makes no effort to defend the court of appeals' view that testimony from public safety officials in support of a challenged regulation can be rejected as "self-serving." Pet. App. 11a. Nor does he explain why the videotape that he prepared for use in this litigation, which showed him behaving himself, provides any basis to invalidate the ordinance. Instead, respondent confines himself to observing

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First Amendment permits broader regulatory power for property that is especially congested. See 452 U.S. at 651, 655. The same is true of the public property abutting a large sports stadium.

that a municipality must defend a challenged regulation with "something more than a bald invocation of a city's interests in promoting safety and preventing congestion." Resp. Br. 8. True enough. But to defend its ordinance, Chicago did not speculate about crowd control problems; it relied on the first-hand experience of police and security personnel in dealing with traffic and congestion around the United Center. See Pet. App. 45a-46a. No precedent supports the Seventh Circuit's denigration of this testimony; and even respondent does not attempt to reconcile the holding below with decisions in other circuits rejecting the need for additional evidence documenting the effects of peddling apart from the testimony of officials charged with protecting the public's safety. See, *e.g.*, *International Caucus of Labor Committees v. City of Montgomery*, 111 F.3d 1548, 1661 (11th Cir. 1997); *One World One Family Now v. Honolulu*, 76 F.3d 1009, 1015 (9th Cir.), cert. denied, 519 U.S. 1009 (1996).

c. Respondent agrees with the Seventh Circuit that the ordinance is invalid because it is not restrictive enough; respondent complains that the ordinance "leaves untouched . . . leafleting, newspaper sales, street performances, and charitable solicitations." Resp. Br. 10. But surely Chicago should not be criticized because its ordinance responded only to the problem that had manifested itself; when Chicago enacted this ordinance, it had not experienced significant congestion problems associated with these activities at the United Center.[2] More important, a peddling regulation is not invalid simply because it does not address every conceivable source of congestion, as the Ninth and District of Columbia

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[2] With respect to newspaper sales in particular, even the court of appeals acknowledged that because newspapers can be sold so much more quickly than books, "the different treatment of newspapers and books helps achieve the City's goal of limiting traffic congestion." Pet. App. 7a. This point also explains why the United Center permits the sale of hockey programs, about which respondent also complains. See Resp. Br. 10.

Circuits have held. In *One World*, the peddling ban was upheld even though it allowed leafleting, see 76 F.3d at 1014 & n.9. And in *ISKCON v. Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995), the peddling ban was upheld even though it exempted book and bumper sticker sales. See *id.* at 956-58. These holdings are correct; a challenged regulation is narrowly tailored as long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (internal quotations and citation omitted).[3]

2. Respondent supports the Seventh Circuit's invalidation of the 1,000-foot no-peddling zone by making the astonishing

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[3] Thus, this case stands in contrast with *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), on which respondent relies. See Resp. Br. 10. In that case, the city left unregulated noncommercial newsboxes, which were the principal source of the streetscape clutter the city had attempted to address. See 507 U.S. at 424-26. *Perry v. Los Angeles Police Department*, 121 F.3d 1365 (9th Cir. 1997), cert. denied, 523 U.S. 1047 (1998), is similar. In that case, the challenged law restricted solicitation only by persons not affiliated with a not-for-profit entity without any indication that the persons subject to the prohibition posed more serious problems than those who were exempted. See *id.* at 1369-71. Even further afield is the decision invalidating a public airport's ban on the distribution of literature in *Lee v. International Society for Krishna Consciousness*, 505 U.S. 830 (1992) (per curiam), as well as the decision to invalidate a prohibition on handbilling as an anti-littering measure in *Schneider v. New Jersey*, 308 U.S. 147 (1939). The Court has treated prohibitions on the sale or distribution of literature in areas of special congestion differently; in *Lee* the airport's prohibition on the sale of literature was upheld in a companion case. See *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 683-85 (1992). Moreover, the leafleting ban was invalidated because a majority of the Court concluded that leafleting was unlikely to create congestion. See *id.* at 690-93 (O'Connor, J., concurring and concurring in the judgment); *id.* at 702-03 (Kennedy, J., concurring in the judgments). A prohibition on peddling, in contrast, is properly justified by the interest in minimizing congestion, as the Court's decision to uphold the sales restriction in that litigation, as well as the holding in *Heffron*, well illustrates.

claim that "there is no evidence in the record whatsoever to support a ban on peddling of this scope." Resp. Br. 12. The court of appeals itself acknowledged that "the 1,000-foot ban encompasses a majority of the United Center's parking lot." Pet. App. 14a. For this reason, as the district court concluded, the ordinance "directly targets its legitimate concerns; the ordinance bans peddling—an activity that disrupts pedestrian and traffic flow—in the area with the heaviest concentration of pedestrians and automobiles." Pet. App. 49a. See also MLB Br. 6-7.[4]

Respondent defends the Seventh Circuit's view that a no-peddling law should identify only the areas where congestion is most intense. See Resp. Br. 13. Aside from the reality that no municipality could responsibly court the enormous damages liability it faces under the holding below—permitting as it does federal courts to invalidate peddling bans whenever they disagree with the municipality's view of how to map the areas of most intensive congestion—this approach is, again, simply a demand that municipalities come up with the least restrictive means of regulating peddling. As we explain in the petition, the Ninth and District of Columbia Circuits have rejected that approach. See *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495, 498 (D.C. Cir. 1997), cert. denied, 532 U.S. 1108 (1998); *One World*, 76 F.3d at 1014-15. It is obviously inconsistent as well with this

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[4] Respondent complains that the ordinance bans book sales even when the United Center is not hosting an event. Resp. Br. 12. Even the court of appeals did not criticize the ordinance on this basis; Chicago has a long-standing practice of enforcing the ordinance only close in time to an event. There is no evidence in this record that the ordinance has ever been enforced against respondent or anyone else except in proximity to an event, and actual enforcement practices must be considered when evaluating a facial challenge to a regulation of expressive activity. See, *e.g.*, *Ward*, 491 U.S. at 795-96; *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 & n.11 (1988).

Court's rejection of a least-restrictive-means test, as we explain above.[5]

3. Respondent insists that apart from its justification and tailoring, the ordinance offends the First Amendment because it denies him access to his "desired forum and audience." Resp. Br. 15. As we explain in our petition, there is no precedent for the Seventh Circuit's view that those engaged in the sale of merchandise are always entitled to ply their trade in their "desired forum," to their "desired audience," especially when that forum and audience is in the specially contested areas outside of a major sports venue. To support the Seventh Circuit's unprecedented holding on this point, the best respondent can do is cite *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), and *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), but in both of those cases the Court did no more than sustain the right of a homeowner to place signs containing his preferred messages on his own property. See *Gilleo*, 512 U.S. at 56-58; *Linmark*, 431 U.S. at 92-94.

Under the ordinance at issue here, respondent has significant means to access his desired forum and audience. Inside the 1,000-foot zone, he can distribute leaflets, including leaflets advertising his book. Indeed, the ordinance permits respondent to promote the book within the no-peddling zone to his heart's content; he is required only to find other locations to sell the book. To be sure, it would probably be more efficient for respondent to be able to sell his book within the zone, but that is not a sufficient basis to invalidate a peddling restriction, as the Ninth and District of Columbia Circuits have held. See *Henderson v. Kennedy*,

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[5] In this vein, respondent also observes that Chicago has adopted "more carefully drawn" no-peddling zones around other sports venues. Resp. Br. 13 n.7. If anything, this demonstrates that Chicago does not take an arbitrary approach to peddling bans. Rather, each is tailored to the demands of its neighborhood.

253 F.3d 12, 17 (D.C. Cir. 2001), cert. denied, 535 U.S. 986 (2002); *Vietnam Veterans Memorial*, 116 F.3d at 497; *One World*, 76 F.3d at 1014. Indeed, for just this reason, Judge Easterbrook, without contradiction from the Seventh Circuit's panel that decided this case, concluded that the holding below is in conflict with the law in these other circuits. See Pet. App. 30a-31a.[6]

In fact, *One World* upheld a peddling ban that prohibited the plaintiffs from selling T-shirts to Waikiki tourists, their "intended audience," on the public way. *One World*, 76 F.3d at 1014. There is no material difference between Honolulu's ban and Chicago's. Both bans—and Chicago's no-peddling zone is far smaller—prohibit peddling in an area that peddlers consider desirable. Both bans leave open essentially the same alternative channels of communication: giving away the product, distributing literature, selling the product on private property in the zone, solicitation, or otherwise conveying their message to passersby. These decisions simply cannot be reconciled.[7]

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[6] Respondent cites *United States v. Grace*, 461 U.S. 171 (1983), to support his argument on this point, but in that case the Court did not reach the question whether a law banning demonstrations on public sidewalks outside of the Supreme Court left open sufficient alternatives, since the Court found the law to have no adequate justification. See *id.* at 183.

[7] Peddling restrictions have been invalidated only when they are not limited to areas of special congestion or involve far more sweeping prohibitions. In *Ayres v. City of Chicago*, 125 F.3d 1010 (7th Cir. 1997), for example, the court merely held that the plaintiff had a sufficiently meritorious claim to support preliminary injunctive relief, *see id.* at 1016-17, and to the extent that the court suggested that the plaintiff's claim had merit, it was only because the no-peddling zone was so large, encompassing virtually all of downtown Chicago. See *id.* at 1015-16. The regulation at issue in *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), cert. denied, 520 U.S. 1251 (1997), effectively prevented visual artists from selling their art in any public area in New York City. See *id.* at 697-98. In *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th

4. In an effort to address our submission—supported by Judge Easterbrook's well-reasoned dissenting opinion—that the decision below is in conflict with the law in other circuits, respondent asserts that all decisions applying the test for regulation of time, place and manner of speech are "fact-bound." Resp. Br. 18. That will not hold water; as we explain above, the legal standards employed by the Seventh Circuit for evaluating this ordinance cannot be reconciled with the standards employed by other circuits, which do not dismiss police testimony as meaningless; do not require a yard-by-yard justification for a no-peddling zone; and do not guarantee plaintiffs the right to sell to their "preferred audience" when leafleting or other low-cost advertising methods are available.

Respondent observes that the district court could yet award him some sort of narrow relief of limited significance. See Resp. Br. 2, 9-10. But the problem with the Seventh Circuit's opinion does not inhere in the relief that respondent will receive; this case is not a class action, and it is therefore a foregone conclusion that no relief will issue except for respondent individually. The problem with the decision below is with the legal standards that the Seventh Circuit has adopted. The test the Seventh Circuit has created for no-peddling laws is so demanding that these laws will become virtually impossible to defend. See Pet. 20-21. As Judge Easterbrook observed, the breadth of the decision below enables peddlers of virtually any expressive material to invalidate no-peddling zones and descend upon the crowds outside any stadium in the Seventh Circuit. Pet. App. 32a-33a. And as our amici observe, this holding will cast a pall on similar laws throughout the country, inviting legal challenges at a time of great budgetary difficulties—with substantial litigation risk and exposure to damages liability.

Cir. 1990), the plaintiffs were not permitted to pass out leaflets to their intended audience. See *id.* at 1229.

See MLB Br. 12-13. As we explain above, the legal principles that should govern no-peddling laws have been settled since at least *Heffron*. This Court should not permit the Seventh Circuit's radical opinion to destabilize what had been a settled area of law—indeed, an area of constitutional law that concerns core municipal interests in protecting the public safety and welfare.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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